

Appendix A

DEPARTMENT OF DEFENSE LEGISLATION FISCAL YEAR 1998

National Defense Authorization Act for Fiscal Year 1998

Introduction

On 18 November 1997, President Clinton signed the National Defense Authorization Act for Fiscal Year 1998 (1998 DOD Authorization Act).¹ What follows is an overview of the key provisions, with an emphasis on its impact on fiscal, procurement, and operational activities within the Department of Defense (DOD).

Congress Troubled by Army's Funding of NTC Rotations

The 1998 DOD Authorization Act provides funding for the operation of prepositioned equipment for training rotations at the Army's National Training Center (NTC), Fort Irwin, California.² The conference report also reflects Congress' concern over the Army's recent proposal to have visiting units foot the bill for operational expenses out of their home station budget. In the opinion of the conferees, such a process will reduce the overall effectiveness of unit training and, hence, the overall readiness of our forces.³

Measuring OPTEMPO and PERSTEMPO

Concerned about the DOD's ever-increasing operations tempo (OPTEMPO) and personnel tempo (PERSTEMPO), Congress is scrutinizing their impact on military readiness.⁴ Consequently, Congress directed the Chairman of the Joint Chiefs of Staff (CJCS) to develop a common means of measuring deployment activity within the DOD.⁵ Additionally, Congress separately directed the Secretary of Defense to report on the number of military personnel deployed overseas as of 30 June 1996 and 30 June 1997.⁶

Congress Focuses on the Accuracy of Readiness Reports

Continuing to reflect its concern over unit readiness in this time of shrinking budgets, Congress has directed the DOD to expand its quarterly readiness reports to provide a more comprehensive picture of unit readiness.⁷ What is the motivation behind this? In its conference report, the House National Security Committee (HNSC) noted "a growing disconnect between the readiness picture presented by 'official' readiness reports and reality out in the field."⁸ As a result, the 1998 DOD Authorization Act directs the Secretary

1. Pub. L. No. 105-85, 111 Stat. 1629 (1997).

2. *Id.* § 307.

3. H.R. CONF. REP. NO. 105-340, at 705 (1997). The House Appropriations Committee (HAC) viewed this "pay-as-you-go" training policy as "a significant policy change that has the effect of reducing funding to maintain the readiness of the Army's combat units." *Id.* Consequently, beginning with Fiscal Year (FY) 1999, the HAC directed the Army to "fully fund" rotations to the NTC. H.R. REP. NO. 105-206, at 38 (1997). Moreover, the HAC was troubled over the Army's decision to reduce the number of annual rotations at Fort Irwin from 12 to 10 (each rotation lasts four weeks). The HAC announced that it would "be closely monitoring this change for any adverse effects on the readiness of Army units." *Id.* at 43. Finally, note that the 1998 DOD Appropriations Act provides an additional \$30 million to cover the "NTC rotation shortfall." H.R. CONF. REP. NO. 105-265, at 66 (1997).

4. In one of his last appearances before Congress, former Chairman of the Joint Chiefs of Staff, General John Shalikashvili, stated that today's readiness problems "bear no comparison with the 'hollow force' of the 1970s, but 'cracks' are beginning to show." Jack Weible, *Readiness "Cracks" Reflect Several Shortages*, ARMY TIMES, Sept. 8, 1997, at 6. Additionally, General Shalikashvili observed that only 40,000 personnel out of 1.4 million are temporarily deployed overseas. *Id.*

5. Pub. L. No. 105-85, § 326, 111 Stat. 1629.

6. *Id.* § 332.

7. *Id.* § 322 (amending 10 U.S.C. § 482). See George C. Wilson, *E-Mail Lament: "Readiness In Tailspin"*, ARMY TIMES, Aug. 18, 1997, at 3 (survey of e-mail traffic on an "unofficial military Internet network" reflects perception of reduced readiness).

of Defense to submit a plan on implementing the expanded readiness reports not later than 15 January 1998. Furthermore, Congress withheld ten percent of the DOD's Operation and Maintenance (O&M) funds from obligation, pending receipt of the plan.⁹

Still focusing on the overall utility of readiness reports, Congress directed the CJCS to assess military preparedness of both active duty and reserve component commands under "a tiered readiness system." Under such an analysis, units are categorized based on their role and their time of deployment in response to a contingency or conflict.¹⁰ Despite this directive, however, Congress prohibited any military department from implementing a "tiered readiness system" (i.e., one that would place units in certain categories based upon the likelihood and time by which it would respond to a military conflict) absent Congressional consent.¹¹

Relief From Administrative Actions That Are Adverse to Military Training or Readiness?

The 1998 DOD Authorization Act requires the Secretary of Defense to notify Congress and the President of any federal administrative action which would have a significant adverse impact on the readiness or military training of critical components within the armed forces.¹² Unless the Secretary of Defense or the President determines otherwise, this notice delays implementation of the proposed action for thirty days. During this time, the Secretary of Defense and the head of the proponent agency are to work things out. If agreement cannot be reached on how the proposed action will apply to the DOD, the President shall take "final action" on the matter. The President must then notify the Congress of his ultimate determination.¹³

Secretary of Defense Must Report on the Movement of O&M Funds

Congress is concerned about the movement of funds between O&M accounts. As a result, if the reallocation of O&M funds between operations subactivities exceeds \$15 million in any given month, the Secretary of Defense must notify Congress of the reasons for, and the impact of, this action.¹⁴ Similarly, Congress extended through Fiscal Year (FY) 2000 the requirement that the Secretary of Defense submit a semiannual report to Congress on transfers from high-priority readiness appropriations.¹⁵

Joint Exercise Funding

Congress directed the Secretary of Defense to report on past and planned joint training exercises sponsored by the CJCS Exercise Program and the Partnership for Peace Program.¹⁶ The report must describe the duration, objectives, participants, costs, and training value of the exercises, as well as the extent to which the exercise enhances the military readiness of all participating forces. Congress further limited the expenditure of FY 1998 CJCS Exercise Program funding to not more than ninety percent of this year's allocation, pending submission of the report.¹⁷

8. H.R. REP. NO. 105-132, at 328 (1997).

9. Pub. L. No. 105-85, § 322, 111 Stat. 1629 (1997).

10. This report will also assess readiness requirements under a "tiered readiness and response system" that categorizes units in accordance with their potential role in military conflicts. There will be three tiers: (1) forward-deployed and crisis response forces to be deployed within 10 days (Tier I); combat-ready follow-on forces to be deployed within 60 days (Tier II); and combat-ready conflict resolution forces to be deployed within 180 days (Tier III). *Id.* § 329.

11. *Id.* § 328.

12. *Id.* § 325 (adding 10 U.S.C. § 2014). Examples of a "critical component" include "a Marine battalion preparing for deployment as part of a Marine Expeditionary Unit, or Special Operations Forces dedicated to a specific mission." H.R. CONF. REP. NO. 105-340, at 707 (1997).

13. Pub. L. No. 105-85, § 325, 111 Stat. 1629.

14. *Id.* § 321. Initially, the House National Security Committee (HNSC) would have required the Secretary of Defense to notify Congress *prior* to reallocating O&M funds above a certain threshold. See H.R. REP. NO. 105-132, at 329 (1997).

15. Pub. L. No. 105-85, § 323, 111 Stat. 1629 (amending 10 U.S.C. § 483).

16. *Id.* § 331. The HNSC cited a recent GAO report which "noted [that] a large number of joint exercises conducted in 1995 had little training value, with nearly 75 percent conducted for reasons other than training, such as a show of military presence in a region or to foster relationships with other nations." H.R. REP. NO. 105-132, at 331 (1997). The HNSC expressed its concern that the number of CJCS Exercise Program and Partnership for Peace program exercises "is exceeding the ability of the services to meet these requirements in what is already a high paced operational environment." *Id.* See *Military Capabilities: Stronger Joint Staff Role Needed to Enhance Joint Military Training*, GAO/NSIAD-95-109 (1995).

Secretary of Defense Must Report on Environmental Fines and Penalties Assessed Against the DOD

Congress directed the Secretary of Defense to submit an annual report detailing all fines and penalties imposed on the DOD for violations of federal, state, or local environmental laws.¹⁸ The reporting requirement begins with FY 1998.¹⁹ Additionally, the Secretary of Defense must report to Congress the fines and penalties assessed against the DOD for fiscal years 1994 to 1997.²⁰

Sense of Congress: Stay Away from OCONUS Environmental Preservation Missions

In a "Sense of Congress" provision,²¹ Congress voiced its position that members of the armed forces should not be deployed to assist another country in its environmental preservation activities, unless the Secretary of Defense determines that such action is justified for reasons of national security. Activities undertaken for humanitarian purposes, disaster relief activities, peacekeeping activities, or operational training activities are expressly excepted. Environmental compliance and restoration activities associated with overseas military installations and deployments are also permitted.²²

DOD Recovery and Cost-Sharing Practices at Environmental Cleanup Sites

Congress has directed the Secretary of Defense to establish regulations which would require all DOD agencies to aggressively pursue recovery of costs from third parties responsible for the mess found at DOD environmental restoration sites.²³ The regulations will require the DOD agencies to obtain all data (including cost data) relevant to identifying contractors and other third parties who contributed to the contamination of DOD sites.²⁴ In the accompanying conference report, Congress concluded that the lack of uniform guidance for the recovery of such costs "[has] contributed to a lack of focus and minimal cost-recovery or cost-sharing at third party sites, particularly at government-owned/contractor-operated facilities."²⁵

Use Recycled Copier Paper

Congress codified the President's Executive Order mandating increased use of recycled-content paper products.²⁶ Specifically, the new provision requires that, commencing January 1998, the "post-consumer recycled content" of copier paper must be at least twenty percent. This recycled content requirement increases to thirty percent in January 1999 and to fifty percent by January 2004.²⁷ These goals are waived if the cost differential between recyclable content paper and virgin copier paper is "significant."²⁸

17. Pub. L. No. 105-85, § 331, 111 Stat. 1629 (1997). In fact, the HAC noted that as a result of the Quadrennial Defense Review, "DOD announced its plans to decrease the number of man-days required for joint exercises in fiscal year 1998 to 15 percent below the level of fiscal year 1996." Given its concern over the DOD's OPTEMPO/PERSTEMPO, the HAC recommended the funding for JCS Exercises be reduced by \$50 million. H.R. REP. NO. 105-206, at 56-57 (1997). The 1998 DOD Appropriations Act cuts funding for JCS Exercises by \$50 million. H.R. CONF. REP. NO. 105-265, at 78 (1997).

18. Pub. L. No. 105-85, § 344, 111 Stat. 1629 (amending 10 U.S.C. § 2706(b)(2)).

19. *Id.*

20. *Id.*

21. A "Sense of Congress" provision generally highlights areas of congressional concern that are frequently addressed in subsequent authorization and appropriations acts.

22. Pub. L. No. 105-85, *Id.* 347, 111 Stat. 1629.

23. *Id.* § 348.

24. *Id.*

25. H.R. CONF. REP. NO. 105-340, at 711-12 (1997).

26. *See* Exec. Order No. 12,873, 58 Fed. Reg. 54,911 (1993).

27. Pub. L. No. 105-85, § 350, 111 Stat. 1629.

Depot-Level Activities

After much debate, Congress and the President finally agreed on the manner in which depot-level activities would be considered for contracting out and privatization.²⁹ No matter what the level of outsourcing, however, the 1998 DOD Authorization Act requires the Secretary of Defense to identify “core logistics capabilities” crucial to the “strategic and contingency plans of the U.S. Armed Forces” and to ensure that public depot activities maintain the capability to perform this “core work.”³⁰ Nonetheless, the 1998 DOD Authorization Act increases the share of depot maintenance work eligible for conversion to performance by contractors from forty percent to fifty percent.³¹ The Act also requires that any contracted-out depot work be the subject of “fair and open” competition.³² To ensure the fairness of this competitive process, the Comptroller General will review all solicitations and competitions conducted under this authority.³³

A-76: Congress Revisits Contract Outsourcing

Heightened Reporting Requirements

Congress has expanded the report and notification requirements associated with contracting out. Specifically, the 1998 DOD Authorization Act now requires DOD agencies to include a timetable for proposed outsourcing. Congress further extended these notice and reporting requirements to encompass government activities performed by more than twenty DOD civilian employees.³⁴

Standardized Formats

The 1998 Authorization Act also allows the Secretary of Defense to develop standard performance work statements and a “standard request for proposal” to be used in A-76 conversion actions. Congress directed the Secretary of Defense to give priority to activities that have been successfully converted to contractor performance on a repeated basis.³⁵

Tracking the Costs of Outsourcing

Congress amended the requirement to collect and to retain cost data associated with contracting out.³⁶ The Secretary of Defense must collect cost data on outsourcing for the term of the contract, or up to five years.³⁷ Similarly, for commercial activities that are not outsourced, the Secretary of Defense will assemble cost data that compare the costs of government performance with the estimated costs of contractor performance.³⁸ All of this information shall be retained for at least ten years.³⁹

28. *Id.* The original House provision would have excepted DOD agencies from the proposed goals if the cost differential exceeded seven percent. H.R. CONF. REP. No. 105-340, at 713 (1997).

29. Pub. L. No. 105-85, §§ 355-59, 111 Stat. 1629. The Act establishes a statutory definition of “depot-level maintenance and repair” that tracks with that currently used in DOD regulations. *Id.* § 355 (adding 10 U.S.C. § 2460).

30. Specifically exempted, however, are commercial systems purchased by the DOD, where such purchases do not comprise a majority of the sales of that item. *Id.* § 356 (amending 10 U.S.C. § 2464).

31. *Id.* § 357 (amending 10 U.S.C. § 2466).

32. *Id.* § 359 (adding 10 U.S.C. § 2469a). Congress specifically noted its concern regarding the possibility of “preferential treatment” being given to any one particular offeror and the extent to which workloads were bundled into one contract vehicle. H.R. CONF. REP. No. 105-340, at 717 (1997).

33. Pub. L. No. 105-85, § 359, 111 Stat. 1629.

34. The previous threshold exempted activities performed by 45 or fewer DOD civilian employees from various notice and reporting requirements. *Id.* § 384 (amending 10 U.S.C. § 2461).

35. *Id.* § 389.

36. *Id.* § 385 (amending 10 U.S.C. § 2463).

37. *Id.*

38. This data collection requirement applies only to those activities that were performed by at least 50 contractor employees before the work was converted to performance by government employees. *Id.*

Funding the Army National Guard's New Mission Statement?

The 1998 DOD Authorization Act expressly authorizes the Secretary of the Army to “provide financial assistance” to a state in support of activities carried out by that state’s Army National Guard.⁴⁰ Specifically, the Secretary may fund Guard units to perform the following activities: training, maintenance and repair of military equipment, and construction.⁴¹ Any funds disbursed under this authority will be made through the Chief of the National Guard Bureau.⁴²

Authority to Retain Funds Collected Under Warranty Claims

Congress has established a pilot program for the Air Force⁴³ which allows the agency to retain any funds collected for maintenance work performed on aircraft engines in public depots while still under warranty. The funds will be available for the same purposes and same period of availability as the appropriation to which they are credited.⁴⁴

“Operation Mongoose” Receives Permanent Authority

The 1998 DOD Authorization Act establishes a permanent program to coordinate the identification, investigation, and prevention of fraudulent financial actions within the DOD.⁴⁵ Congress is specifically interested in accelerating the review of transportation and vendor payments. In addition, Congress expects the DOD to use this new authority to make more effective use of, and obtain information from, other government agencies in combating fraud within the military departments.⁴⁶

The Cost of Political Correctness: Loss of Funds Causes Universities to Reconsider Ban on Military Recruiting

The 1995 DOD Authorization Act directed the DOD to suspend contract and grant funding to any college or university that prohibited military recruiting on its campus.⁴⁷ Hitting them where it hurts—in the pocketbook—university after university has re-looked the costs of political correctness versus fiscal stability.⁴⁸ As a consequence, many universities have reversed themselves. A noteworthy exception to this trend, however, was the State of Connecticut. At the time of the conference report, Connecticut state universities and colleges still banned military recruiting on their campuses.⁴⁹ According to one newspaper, Connecticut stood to lose \$70 million in federal grants.⁵⁰ Noting that the governor of Connecticut had “pledged” to obtain legislation to prohibit universities from banning

39. *Id.*

40. *Id.* § 386 (adding 32 U.S.C. § 113).

41. The Secretary of the Army will coordinate and obtain the consent of the Chief, National Guard Bureau when making these assignments. *Id.*; see 10 U.S.C. §§ 3013(b)(6),(10), (11) (1994).

42. These funds are available only to pay for activities performed by the Guard during the same fiscal year as that for which the funds were appropriated; in other words, the *bona fide* need rule applies. Pub. L. No. 105-85, § 386, 111 Stat. 1629.

43. No pun intended.

44. Pub. L. No. 105-85, § 391, 111 Stat. 1629.

45. *Id.* § 392.

46. H.R. CONF. REP. NO. 105-340, at 724-25 (1997).

47. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994). See Major Nathanael Causey et al., *1994 Contract Law Developments—The Year in Review*, ARMY LAW., Feb. 1995, at 18.

48. See, e.g., Katherine Rizzo, *Military Recruiters Back On Campus—Congress Cuts All Federal Student Aid to Schools Maintaining a Ban*, PATRIOT LEDGER, Oct. 25, 1997, at 8 (stating that from a high of 138 campuses, only a handful of university-level institutions still prohibit military recruiters).

49. H.R. CONF. REP. NO. 105-340, at 736 (1997).

military recruiters, Congress agreed to preserve any funds otherwise intended for Connecticut universities until March 1998.⁵¹ In early November 1997, the governor of Connecticut signed a bill allowing military recruiting on Connecticut state campuses.⁵²

Congress Establishes a “Requirement of Exemplary Conduct”

The 1998 DOD Authorization Act establishes a uniform policy requiring “exemplary conduct” by Army and Air Force leaders. Under this provision, “all commanding officers and others in authority” are required:

(a) to show in themselves a good example of virtue, honor, patriotism, and subordination;

(b) to be vigilant in inspecting the conduct of all persons who are placed under their command;

(c) to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army/[Air Force], all persons who are guilty of them; and

(d) to take all necessary and proper measures, under the laws, regulations, and customs of the Army/[Air Force], to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.⁵³

Cost Accounting Standards Board Under Scrutiny

In the conference report comments, Congress highlighted its concerns as to whether government contracting cost accounting standards “are an impediment to acquisition streamlining.”⁵⁴ With this in mind, the conferees directed the GAO to review and to analyze the mission of the Cost Accounting Standards Board. According to the conferees, such a study would aid Congress in “balanc[ing] . . . the needs of taxpayers and the need for greater acquisition streamlining.”⁵⁵

Hallelujah! DOD Finally Receives Authority to Enter into Severable Service Contracts That Cross Fiscal Years

In October 1994, Congress passed the Federal Acquisition Streamlining Act⁵⁶ (FASA), which allowed most non-DOD agencies with a statutory exception to the bona fide need rule for severable service contracts.⁵⁷ Under 41 U.S.C. § 253l, most non-DOD agencies (except the Coast Guard⁵⁸ and NASA) have the authority to award and to fund *any* service contract for a period not to exceed one year (exclusive of options) at any time during the fiscal year. Meanwhile, DOD agencies were permitted to enter into contracts crossing fiscal years only for specified services, most dealing with the maintenance of tools, equipment, and facilities.⁵⁹ The 1998

50. *Panel Discussion: A Question of Rights*, HARTFORD COURANT, NOV. 4, 1997, at A10 [hereinafter *Panel Discussion*].

51. H.R. CONF. REP. NO. 105-340, at 736 (1997).

52. *Panel Discussion*, *supra* note 50.

53. Pub. L. No. 105-85, § 507, 111 Stat. 1629 (1997) (adding 10 U.S.C. §§ 3583, 8583). Interestingly, Congress did not identify any other service or agency for this special treatment.

54. H.R. CONF. REP. NO. 105-340, at 771 (1997).

55. *Id.* The HNSC noted that this report, which was first requested by the chairmen of the committees on National Security and Government Reform and Oversight in June 1996, was overdue. The HNSC requested that the GAO submit its report and recommendations not later than 31 December 1997. H.R. REP. NO. 105-132, at 387 (1997).

56. Pub. L. No. 103-355, § 1073, 108 Stat. 3243 (1994) (adding 41 U.S.C. § 253l).

57. *Id.* Services contracts are presumed to be the bona fide need of the fiscal year in which performed. See *In re Incremental Funding of Multiyear Contracts*, B-241415, 71 Comp. Gen. 428 (June 8, 1992); *EPA Level of Effort Contracts*, 65 Comp. Gen. 154 (Dec. 24, 1985).

58. Congress subsequently extended this authority to the Coast Guard in FY 1996. See Pub. L. No. 104-324, § 214(b), 110 Stat. 3915 (1996).

59. 10 U.S.C. § 2410a (1994); U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 237.106 (Apr. 1, 1991).

DOD Authorization Act now places DOD agencies on par with most non-DOD agencies and extends this discretionary fiscal authority to all severable service contracts.⁶⁰ Under the revised 10 U.S.C. § 2410a, DOD activities may enter into a severable service contract “that begins in one fiscal year and ends in the next fiscal year if . . . the contract period does not exceed one year.”⁶¹ Additionally, the conference report directs the Secretary of Defense to report to Congress the extent to which this authority is used over the next two fiscal years. Congress further directed the GAO to report *any* abuses of this authority and recommendations for further changes.⁶²

Undefinitized Contract Actions and Humanitarian and Peacekeeping Operations

Agency heads can now waive otherwise applicable restrictions on undefinitized contracting to support humanitarian and peacekeeping operations.⁶³ Unless waived, however, a DOD contracting officer must still abide by the fiscal and contractual limits associated with undefinitized contract actions.⁶⁴

Restructuring Costs

The 1998 DOD Authorization Act permanently recognizes the allowability of restructuring costs for business combinations.⁶⁵ Such costs are calculated under a two-to-one savings-to-cost formula employed in the National Defense Authorization Act for Fiscal Year 1997.⁶⁶ Contractor restructuring costs are allowable when: (1) the projected savings associated with the business combination will be at least twice that of the costs allowed, or (2) the projected savings will exceed the allowed costs and the business combination will result in the preservation of a national defense “critical capability.”⁶⁷ The 1998 DOD Authorization Act further requires the Secretary of Defense and the GAO to report on the overall costs and impact of the restructuring of the nation’s defense industry.⁶⁸

Multiyear Procurement Contracts Must Now Be Authorized

DOD activities are now prohibited from entering into multiyear procurement contracts greater than \$500 million unless otherwise specifically authorized by law.⁶⁹ This restriction does not apply to multiyear contracts entered into prior to the 1998 DOD Authorization Act. The Act also mandates additional notice requirements as to the dollar amount of the procurement, the amount of any economic order quantity, and the amount of the unfunded contingent liability.⁷⁰

Allowability of Executive Salaries Based On an Industry-Wide Benchmark

60. Pub. L. No. 105-85, § 801, 111 Stat. 1629 (1997).

61. *Id.*

62. H. CONF. REP. 105-340, at 771-72 (1997). Curiously, the conferees specifically identified “efforts to circumvent year-end spending limitations.” *Id.* If anything, this new authority will encourage contracting officers to better balance their workload and shift the commencement of contracts and options away from the September-October time frame. *See* Funding of Maintenance Contract Extending Beyond Fiscal Year, B-259274, May 22, 1996, 96-1 CPD ¶ 247 (“to minimize the surge in workload,” the Air Force staggered its contract periods so that fewer service contracts expired at the end of the fiscal year).

63. Pub. L. No. 105-85, § 807, 111 Stat. 1629 (amending 10 U.S.C. § 2326).

64. *See* 10 U.S.C. § 2326 (placing time restrictions and funding limitations on undefinitized contract actions).

65. Pub. L. No. 105-85, § 804, 111 Stat. 1629 (amending 10 U.S.C. § 2325). The term “business combinations” includes mergers and acquisitions. *Id.*

66. The two-to-one cost-to-savings ratio was employed in the Omnibus Consolidated Appropriations Act, 1997, and was applicable only to FY 1997 funds used to pay contractors. *See* Pub. L. No. 104-208, § 8115, 110 Stat. 3009 (1996).

67. Pub. L. No. 105-85, § 804, 111 Stat. 1629.

68. *Id.*

69. *Id.* § 806 (amending 10 U.S.C. § 2306b).

70. *Id.* This new subsection does not apply to NASA or the Coast Guard.

For the past few years, Congress and defense industry executives have jostled back and forth about the extent to which senior executive compensation should be allowed.⁷¹ As with restructuring costs, Congress seems to have taken a final position on this issue by allowing reimbursement of executive level salaries as measured under an industry-wide benchmark.⁷² Based on a review of commercially available surveys of executive compensation, the Office of Federal Procurement Policy (OFPP) will determine a benchmark compensation amount. In essence, this “benchmark” will be the median amount of compensation provided senior executives of all corporations with annual sales greater than \$50 million.⁷³ So pull out your latest issue of *Forbes* and try to figure out this year’s benchmark.

Use of Expired Funds Collected During the Contract Litigation Waltz

Congress has extended the availability of funds collected on a Contract Disputes Act claim filed against a contractor by a DOD activity.⁷⁴ You know the drill about how agencies must treat these funds—once collected, they retain their fiscal identification and must either be “deposited” back into their original fund account, or, if appropriate, treated as miscellaneous receipts. In many instances, the account at issue may already be expired, if not yet closed.⁷⁵ Now, regardless of their status, these collections remain available to pay off any subsequent settlement or judgment rendered in favor of the contractor regarding the government claim.⁷⁶ Of course, no new authority would be complete without a new statutory reporting requirement. The 1998 DOD Authorization Act also requires the DOD Comptroller to report the amount of funds made available under this new authority, the total amounts collected, and the amounts ultimately disbursed.⁷⁷

List of Firms Not Eligible for Defense Contracts

The 1998 DOD Authorization Act directs the Secretary of Defense to develop and to maintain a list of all firms and their subsidiaries that are prohibited from performing DOD contracts because of substantial ownership by governments that support international terrorism.⁷⁸ Any firm cited on the list may petition the Secretary of Defense for removal if it can demonstrate that its inclusion was erroneous or that its ownership has changed significantly. This prohibition extends to subcontracts greater than \$25,000.⁷⁹

Contractor Guarantees No Longer Required On Major Weapon Systems Buys

The DOD is no longer required to obtain written guarantees which cite government-specific terms from major weapon systems contractors.⁸⁰ This action apparently responds to repeated DOD requests that the warranty requirement be repealed. Moreover, in support of this action, the conferees noted a recent GAO report concluding that the DOD spends an additional \$270 million annually for warranties that are not cost effective.⁸¹ Contracting officers now have the discretion to determine the appropriate use of such

71. See, e.g., National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-210, § 809, 110 Stat. 2422 (1996) (setting the ceiling for executive compensation at \$250,000).

72. Pub. L. No. 105-85, § 808, 111 Stat. 1629 (amending 10 U.S.C. § 2324 and the Office of Federal Procurement Policy Act, 41 U.S.C. § 401).

73. “Senior executive” is defined as the chief executive officer and the four most highly compensated employees in management positions of the contractor. *Id.*

74. *Id.* § 831.

75. See generally 2 U.S. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL PROCUREMENT LAW 6-115 through 6-122 (1992). See also Army Corps of Engineers—Disposition of Funds Collected in Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838 (Sept. 8, 1986).

76. Note that, absent this exception, judgments rendered in the contractor’s favor are paid out of the Judgment Fund. 31 U.S.C. § 1304 (1994). Agencies must then reimburse the Judgment Fund with funds current at the time of judgment against the agency. 41 U.S.C. § 612(c) (1994); Bureau of Land Management—Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308, 312 (Apr. 24, 1984).

77. Pub. L. No. 105-85, § 831, 111 Stat. 1629 (1997).

78. *Id.* § 843.

79. This restriction applies unless the head of the agency determines that “compelling reasons” exist for allowing a subcontracting relationship with the listed firm. *Id.*

80. *Id.* § 847 (repealing 10 U.S.C. § 2403).

81. H.R. REP. NO. 105-206, at 248 (1997).

contract performance guarantees. The conferees further directed the Secretary of Defense to issue regulations ensuring that program managers “actively and thoroughly examine the value and utility of contractor guarantees . . . and pursue such guarantees where appropriate and cost effective.”⁸²

Congress Mandates Greater Use of Government Purchase Cards

The 1998 DOD Authorization Act requires that by 1 October 1998, at least sixty percent of all DOD micropurchases be made by use of the government commercial purchase card.⁸³ By FY 2001, at least ninety percent of all DOD micropurchases must be made using the streamlined procedures allowed by the purchase card. The provision allows the Secretary of Defense to exclude categories of purchases that are determined to be inappropriate for this streamlined treatment.⁸⁴

The Future of FACNET in Doubt

Congress repealed the requirement that agencies use the Federal Acquisition Computer Network (FACNET) for electronic commerce.⁸⁵ Following on the heels of a GAO report critical of FACNET, the repeal is made in recognition of the fact that many agencies are realizing greater success through the use of non-FACNET systems.⁸⁶ Agency heads may now consider all electronic commerce technologies, after giving “due consideration” to the use or partial use of existing electronic architecture. Congress also requires the agency head to ensure that the system “is implemented with uniformity throughout the agency, to the extent practicable.”⁸⁷

CINC Initiative Funds Can Be Used for Force Protection

The 1998 DOD Authorization Act authorizes the use of CINC Initiative Funds “to provide for any force protection requirements that emerge in . . . [the CINCs] respective areas of operation.”⁸⁸ As with past years, the 1998 DOD Appropriations Act provides no more than \$25 million for the CINC Initiative Fund Account.⁸⁹

The Bad News: Defense Acquisition Workforce Cut Yet Again; The Good News: It Could Have Been Worse

The 1998 DOD Authorization Act directs the Secretary of Defense to trim the defense acquisition workforce by 25,000 individuals.⁹⁰ The Secretary of Defense may waive up to 15,000 positions from this mandated cut in personnel if he determines that any additional cuts “would be inconsistent with the cost-effective management of the defense acquisition system . . . and would adversely affect military readiness.”⁹¹ Additionally, Congress directed the Secretary of Defense and the Task Force on Defense Reform to

82. Pub. L. No. 105-85, § 847, 111 Stat. 1629.

83. *Id.* § 848.

84. *Id.*

85. *Id.* § 850 (amending 41 U.S.C. § 426; repealing 41 U.S.C. § 426a). The Federal Acquisition Streamlining Act (FASA) mandated the use of FACNET as the uniform means for all government agencies to advance into the world of electronic commerce. Pub. L. No. 103-355, § 9001(a), 108 Stat. 3399 (1994). In fact, until repealed by this provision, the agency’s implementation of FACNET into its electronic commerce activities was tied to the simplified acquisition threshold. 41 U.S.C. § 427 (1994).

86. See *Acquisition Reform—Obstacles to Implementing the Federal Acquisition Computer Network*, Jan. 3, 1997, GAO/NSIAD-97-26, at 7 (GAO concludes that the “[d]ifficulties of doing business through FACNET have overshadowed the benefits of using it”).

87. Pub. L. No. 105-85, § 850, 111 Stat. 1629.

88. *Id.* § 902 (adding 10 U.S.C. § 166a(b)(9)). H.R. CONF. REP. NO. 105-340, at 783 (1997).

89. Pub. L. No. 105-56, 111 Stat. 1203, 1206 (1997). The 1998 DOD Appropriations Act also provides the Secretary of Defense no more than \$28.85 million for emergency and extraordinary expenses. Pub. L. No. 105-85, 111 Stat. 1629.

90. Pub. L. No. 105-85, § 912, 111 Stat. 1629. The House bill contained a provision that would have slashed 124,000 positions from the defense acquisition workforce by FY 2002. Under the House version, 40,000 of those positions would have been cut in FY 1998. H.R. CONF. REP. NO. 105-340, at 786 (1997).

91. Pub. L. No. 105-85, § 912, 111 Stat. 1629.

review the DOD acquisition organizational structure and mission statement, with an eye on making additional changes to better reflect DOD acquisition and budgetary needs.⁹²

Congress Provides Greater Fiscal Flexibility to Close Outstanding Contracts

The 1998 DOD Authorization Act allows the Secretary of Defense to establish an account for making final payments on contracts where the underlying funding has been canceled.⁹³ The amount of the final payment, however, must not be greater than the micro-purchase threshold. Once the account has been established, the Secretary of Defense may from time to time transfer procurement or RDT&E funds into the account for closing these dated contracts. Moreover, the Secretary of Defense may not transfer more than \$1 million into the account without additional Congressional approval.⁹⁴ This new account targets contracts entered into and “for which an unobligated balance of an appropriation . . . initially applied to the contract was canceled before December 5, 1990.”⁹⁵

Congress Continues to Tinker with Revolving Funds

Hoping to strengthen the viability of revolving funds, Congress made a few operational adjustments to the DOD’s working capital funds.⁹⁶ First, Congress expanded the ability of working capital funds to obtain “capital assets” by providing the funds contract authority.⁹⁷ Hence, the working capital funds may contract for the procurement of capital assets in advance of the availability of working capital funds. To qualify as a “capital asset,” the cost of developing or procuring the item must be at least \$100,000 and fall into one of the following categories: (1) unspecified minor military construction project; (2) automatic data processing equipment or software; (3) any other equipment; or (4) any other capital improvement.⁹⁸ Congress also struck out against the practice of advance billings. The 1998 DOD Authorization Act now requires the Secretary of Defense to notify Congress when a working capital fund engages in advanced billing and the reasons behind the action.⁹⁹ Additionally, Congress placed a cap on the level of advanced billing by the Navy’s working-capital funds and the Defense Business Operations Fund.¹⁰⁰ Finally, the conferees noted that with “proper budgeting and the use of full costing policies,” the working capital funds would assure sound financial management of the funds and avoid having to resort to advanced billing.¹⁰¹

92. Indeed, Congress also directed the Secretary of Defense to report on the number of DOD acquisition positions cut since 1989 and to establish a uniform definition of the term “defense acquisition workforce.” *Id.* § 912.

93. *Id.* § 1007. Appropriations are canceled or “closed” five years after the end of their period of availability, as defined by the applicable appropriations act. Once closed, any remaining balances are no longer available for obligation or expenditure for any purpose. 31 U.S.C. § 1552(a) (1994). Arguably, the funds are returned to the Department of the Treasury, which, in turn, balances the budget.

94. See H.R. CONF. REP. 105-340, at 792 (1997).

95. Pub. L. No. 105-85, § 1007, 111 Stat. 1629. See 31 U.S.C. § 1553(b) (1994). After an account is closed, agencies may also, within certain limits, charge obligations and adjustments to obligations formerly chargeable to the closed account and not otherwise chargeable to another current agency appropriation to any current agency account available for the same general purpose. Such charges are limited to the lesser of: (1) the unobligated expired balance of the original appropriation, or (2) one percent of the current appropriation available for the same purpose. 31 U.S.C. § 1553(b)(2). See, e.g., Economy Act Payments After Obligated Account Is Closed, B-260993, June 26, 1996, 96-ICPD ¶ 287 (ordering activity used current funds to pay ten-year old obligation).

96. In late 1996, the DOD reorganized the Defense Business Operations Fund (DBOF) structure so as to create four working capital funds: Army, Navy, Air Force, and Defense-wide. The GAO reports that, for fiscal year 1998, these funds “are expected to generate about \$69 billion in revenue and employ about 220,000 civilians and 24,000 military personnel.” *Defense Working Capital Funds: DOD Faces Continued Challenges in Eliminating Advance Billing*, GAO/T-AIMD/NSIAD-97-221 (1997).

97. Pub. L. No. 105-85, § 1011, 111 Stat. 1629 (amending 10 U.S.C. § 2008(k)). See Department of Defense Appropriations Act, 1998, Pub. L. No. 105-56, § 8108, 111 Stat. 1203, 1244 (1997).

98. Pub. L. No. 105-85, § 1011, 111 Stat. 1629.

99. Advanced billing is defined as “a billing of a customer by the fund, or a requirement for a customer to reimburse or otherwise credit the fund, for the cost of goods or services provided . . . on behalf of the customer . . . before the customer receives the goods or before the services have been performed.” *Id.*

100. This action, no doubt, responds in part to a GAO report indicating that DOD working capital funds have yet to operate on a break-even basis. Since 1993, the working capital funds have had to advance bill their customers to avoid cash shortages. According to the GAO, the four DOD working capital funds will disburse approximately \$2.3 billion more than they will collect in fiscal year 1997. *Defense Working Capital Funds: DOD Faces Continued Challenges in Eliminating Advance Billing*, GAO/T-AIMD/NSIAD-97-221 (1997).

101. H.R. CONF. REP. 105-340, at 791-92 (1997). In addition, the 1998 Department of Defense Appropriations Act appropriated \$972 million to put the Defense Working Capital Funds back on track. Pub. L. No. 105-56, 111 Stat. 1203, 1217 (1997).

Bosnia: Congress Flexes Its Power of the Purse

Congress used the 1998 DOD Authorization Act to communicate its serious reservations regarding the continued presence of American troops in Bosnia.¹⁰² In a “Sense of Congress” provision, Congress stated that “United States ground combat forces should not participate in a follow-on force in the Republic of Bosnia and Herzegovina after June 1998.”¹⁰³ As a result, Congress expressly conditioned the funding of American forces in Bosnia and Herzegovina on a certification by the President justifying their continued presence.¹⁰⁴ Absent such a Presidential certification, Congress prohibited the DOD from using any funds “for the deployment of any United States ground combat forces” in this region after 30 June 1998.¹⁰⁵

Reports and Guidance from Congress

Advisory and Assistance Services

In its conference report, the House National Security Committee (HNSC) expressed its concern over the the DOD’s increasing use of advisory and assistance services (AAS).¹⁰⁶ According to the HNSC, the FY 1998 budget request represents a 248 percent increase in AAS funding requests since 1992. Moreover, upon examination of each service’s O&M account, the HNSC found the FY 1998 requirement for AAS constituted a significant increase over that of FY 1997. In this era of significant downsizing, the HNSC concluded that the DOD could not justify such funding. As a result, the HNSC directed that, beginning with the FY 1999 budget request, the Secretary of Defense justify the extent and level of each department’s requirement for AAS and report on the DOD’s overall expenditures for AAS over the previous two fiscal years.¹⁰⁷

Contracting Out Firefighter and Security Activities at Military Installations

The GAO, the Defense Science Board, and the DOD have each informed the HNSC that the prohibition on contracting for firefighting or security guard services is inefficient and costly.¹⁰⁸ Since most of us have been the subject of considerable downsizing and contracting out studies, it would seem logical to conclude that competing these services would result in lower costs and a leaner, more efficient operation, right? The HNSC, however, was concerned that a repeal of this section could “negatively impact national security.”¹⁰⁹ Consequently, the HNSC directed the Secretary of Defense to identify what fire fighting and security guard functions are considered inherently governmental and why. Interestingly, though, the HNSC also instructed the Secretary of Defense to include a plan implementing the outsourcing of fire fighting and security guard functions should the current prohibition be repealed.¹¹⁰

102. Pub. L. No. 105-85, §§ 1201-06, 111 Stat. 1629.

103. As an exception, however, Congress allowed continued U.S. support to a Western European Union-led or NATO-led follow-on force. Such support may include “command and control, intelligence, logistics, and, if necessary, a ready reserve force in the region.” *Id.* § 1202.

104. The certification must state, in part, that the continued presence of U.S. forces in the Bosnia-Herzegovina region is required “to meet the national security interests of the United States” and that U.S. ground forces will not be used as civil police in this region. *Id.* § 1203.

105. *Id.* See Department of Defense Appropriations Act, 1998, Pub. L. No. 105-56, § 8132, 111 Stat. 1203, 1250 (1997).

106. AAS include contracted experts and consultants, studies and evaluations, management support, and technical services. H.R. REP. NO. 105-132, at 293 (1997).

107. *Id.*

108. *Id.* at 294. With a few exceptions, the DOD is prohibited from contracting for firefighting or security guard services at military installations. This proscription does not apply: (1) to overseas installations; (2) to government-owned but privately operated installations; (3) to contracts for such services that were in effect prior to 24 September 1983 and (4) when the contract is for services with local governments at an installation closing within 180 days. 10 U.S.C. § 2465 (1994). There are currently 44 military installations which fall under one of the above exclusions. See *Base Operations: Contracting for Firefighters and Security Guards*, GAO/NSIAD-97-200BR (1997).

109. The committee provided no further insight on this comment. H.R. REP. NO. 105-132, at 293 (1997).

110. The HNSC further directed the Secretary of Defense to provide this plan to both the HNSC and the Senate Armed Services Committee. The HNSC requested this report by 31 December 1997. *Id.*

The HNSC acknowledged the DOD's plans to outsource more than 100,000 civilian positions between FYs 1998 and 2003 as an effort to maximize efficiencies and the overall level of services.¹¹¹ The committee, however, expressed several concerns about these plans. First, the HNSC noted that, in some instances, the DOD is considering outsourcing functions and services currently provided by military personnel. The committee questioned the DOD's estimated savings under such plans, observing that the military personnel performing these services will still be retained. The HNSC was also troubled by the possibility that the DOD would outsource training services and functions. Finally, the committee wondered whether the DOD would have adequate personnel and resources to administer the increased contract workload associated with expanded outsourcing. Consequently, the HNSC directed the Secretary of Defense to review and then to report back on the costs, savings, and scope of the DOD's outsourcing plans. Additionally, the committee asked the Secretary of Defense to determine the level of staff support necessary to manage these planned contract actions. Last, the HNSC requested the Secretary of Defense to identify any studies the DOD planned "to review the return of outsourced services and functions to the private sector."¹¹²

Performance Based Contracting and Environmental Clean Up

The HNSC acknowledged the potential cost savings associated with performance-based contracting for environmental cleanup at DOD installations.¹¹³ In contrast to traditional cost-type contracting, performance-based contracts evaluate contractor performance for the purpose of determining the award fees.¹¹⁴ Contractor performance is measured against the achievement of a prescribed, outcome-oriented result. How those results are attained is the contractor's responsibility. This contracting approach is very appealing, because it encourages contractor innovations and smart business practices. With this in mind, the HNSC directed the Secretary of Defense to report on the viability of using a performance-based approach for all environmental clean-up activities within DOD.¹¹⁵

Logistics Civil Augmentation Programs (LOGCAP)

The HNSC is concerned that each military service is establishing its own unique, and perhaps duplicative, LOGCAP program.¹¹⁶ The GAO reported that both the Air Force and the Navy, which previously relied on the Army's LOGCAP,¹¹⁷ have developed their own contingency support program arrangement.¹¹⁸ The Committee questioned the need for more than one LOGCAP program among the services and noted the potential for duplication of effort and unnecessary expense. As a result, the HNSC directed the Secretary of Defense to submit a report on whether the DOD's needs are best served by one or multiple LOGCAP contracts.¹¹⁹

Department of Defense Appropriations Act, 1998—For 13th Straight Year, DOD Funding Fails to Keep Pace with Inflation

111. *Id.* at 298-99.

112. *Id.*

113. *Id.* at 302-03.

114. The committee cited the demolition of contaminated buildings and the installation of a pump and treat system as examples of how this contracting method can be successfully used. *Id.*

115. The HNSC will use the results of this report to determine the true potential of performance-based contracts and whether employment of this contract type can accelerate cleanup of contaminated sites at a lower cost to the government. *Id.* at 302.

116. LOGCAP uses a civilian contractor to provide logistics and engineering services to deployed forces. LOGCAP provided much of the service support to U.S. troops deployed in Bosnia. It was also used extensively in Somalia, Rwanda, Haiti, Saudi Arabia, Kuwait, and Italy. *Id.* at 320.

117. Since 1992, the Army Corps of Engineers has been responsible for the management and contract administration of LOGCAP. On 1 October 1996, LOGCAP management transferred to the Army Materiel Command; however, the Corps of Engineers will remain responsible for LOGCAP management in Bosnia for the duration of the mission. The costs and efficacy of LOGCAP has been the subject of considerable discussion by Congress and the DOD alike. See, e.g., *CONTINGENCY OPERATIONS: Opportunities to Improve Use of Contractor Support Services*, GAO/NSIAD-97-63 (1997).

118. In August 1995, the Navy awarded the Navy Emergency Construction Capabilities Program. In 1997, the Air Force awarded a contract for a program called the Air Force Contract Augmentation Program. H.R. REP. NO. 105-132, at 320 (1997).

119. The committee directed the Secretary of Defense to provide a report to the congressional defense committees by 1 March 1998. *Id.*

Introduction

On 8 October 1997, President Clinton signed the Department of Defense Appropriations Act for Fiscal Year 1998 (1998 DOD Appropriations Act).¹²⁰ The President's FY 1998 budget request for the 1998 DOD Appropriations Act totaled \$243.9 billion. Congress added \$4.4 billion to the administration's budget request to bring the total amount appropriated to the DOD for FY 1998 to \$248.3 billion, which is \$3.87 billion more than that appropriated for the DOD in all of FY 1997.¹²¹ Still, in real dollars, DOD funding will once again fail to keep pace with inflation. Adjusted for inflation, total funding is 0.6 percent, or \$1.5 billion less than FY 1997 levels. This is the thirteenth straight year of real, inflation-adjusted reductions in defense spending.¹²²

Forces to be Supported¹²³

Department of the Army

The 1998 DOD Appropriations Act is structured to support ten active Army divisions and three armored cavalry regiments, eight Army reserve divisions and three separate brigades, and fifteen enhanced National Guard brigades. This structure provides the minimum force necessary to meet enduring defense needs and to execute the National Military Strategy. Under this force structure, active duty Army end strength is 495,000.¹²⁴

Department of the Navy

The FY 1998 budget supports battle forces totaling 346 ships, a decrease from the FY 1997 battle force structure.¹²⁵ The FY 1998 force structure includes 18 strategic ships, 11 aircraft carriers, 262 other battle force ships, 324 support ships, 1746 Navy/Marine Corps tactical/ASW aircraft, 673 Undergraduate Training aircraft, 443 Fleet Air Support aircraft, 480 Fleet Air Training aircraft, 443 Reserve aircraft, 177 RDT&E aircraft, and 470 aircraft in the pipeline. The end strength for Navy personnel is 390,082 and for the Marines is 174,000.¹²⁶

Department of the Air Force

The fiscal year 1998 budget supports a total active force structure of fifty-one fighter and attack squadrons, ten Air National Guard air defense interceptor squadrons, and nine bomber squadrons (including B-2s, B-52s, and B-1s). The Minuteman and Peacekeeper ICBM forces will consist of 700 active launchers. The active duty end strength is 371,577.¹²⁷

120. Pub. L. No. 105-56, 111 Stat. 1203 (1997). On 14 October 1997, President Clinton used his line item veto authority to cancel an additional \$144 million from the Act. Cancellation Pursuant to Line Item Veto Act, Department of Defense Appropriations Act, 1998, 62 Fed. Reg. 53,704 (1997).

121. Congress provided the DOD with \$1.846 billion in emergency supplemental appropriations in FY 1997. Pub. L. No. 105-18. See H.R. REP. 105-206, at 1, n. 1 (1997).

122. H.R. REP. NO. 105-206, at 2 (1997).

123. The House Appropriations Committee notes that the U.S. military services have "been drawn down to the lowest force levels since the end of World War II." *Id.* at 4.

124. *Id.* at 21.

125. The Navy battle force structure has shrunk over the past few years. In FY 1996, the total number of ships supported was 365. This dropped to 357 ships in FY 1997. *Id.* at 21-22.

126. *Id.*

127. *Id.* at 22-23.

Overseas Contingency Operations Transfer Fund

Congress appropriated \$1.884 billion for expenses directly related to overseas contingency operations. The Secretary of Defense may transfer these funds only to O&M accounts provided for by the 1998 DOD Appropriations Act and working capital fund operations. Once transferred, the funds shall be merged with, and shall be available for, the same purposes and for the same time period as the appropriation in which the funds were transferred.¹²⁸ Additionally, the House Appropriations Committee (HAC) directed that the DOD budget for all future contingency operations be in the Overseas Contingency Operations Transfer Fund."¹²⁹

Environmental Restoration Accounts

Congress appropriated the following funds for each agency's Environmental Restoration Account: Army, \$375.3 million; Navy, \$275.5 million; Air Force, \$376.9 million; and defense-wide activities, \$26.9 million. These funds are available once the service secretary or Secretary of Defense determines that they are required for environmental restoration, reduction and recycling of hazardous waste, and removal of unsafe buildings and debris at sites formerly used by the DOD. The funds may be transferred to other appropriations available for environmental restoration and are available for the same time period and the same purpose as those funds.¹³⁰ If the environmental restoration funds prove unnecessary, they may be transferred back to the environmental restoration account.¹³¹

National Guard Distance Learning Project

The Chief of the National Guard Bureau may permit the use of his National Guard Distance Learning Project equipment to any person or entity on a space available, reimbursable basis. Any funds collected under this authority may be credited for use by the Project to defray the costs associated with such use. These funds remain available without fiscal year limitation.¹³²

Long-Range Air Power Panel

The 1998 DOD Appropriations Act established an independent panel to evaluate the adequacy of current planning for United States long-range air power and to assess the requirement for continued low-rate production of B-2 stealth bombers. By 1 March 1998, the panel must submit to Congress and the President a report regarding the appropriate B-2 bomber force. The report must specifically state the panel's recommendation on whether additional funds for the B-2 should be used for continued low-rate production of the B-2 or for upgrades to improve deployability, survivability, and maintainability.¹³³

Congress Criticizes DOD's Acquisition and Appropriations Practices

The HAC expressed concern about an apparent breakdown of existing multiyear contracting procedures for major weapons systems. The committee was also troubled by what it perceived to be a fundamental breach of appropriations discipline whereby the DOD uses RTD&E funds to initiate production contracts for weapons programs.¹³⁴ According to the HAC, these actions are occurring without the knowledge of the Secretary of Defense or Congress.

128. Department of Defense Appropriations Act, 1998, Pub. L. No. 105-56, 111 Stat. 1203, 1208 (1997).

129. H.R. REP. NO. 105-206, at 40 (1997).

130. These are generally O&M fund accounts.

131. Pub. L. No. 105-56, 111 Stat. 1203, 1208-09.

132. The Chief, National Guard Bureau establishes the amount of reimbursement on a case-by-case basis. *Id.* at § 8095.

133. *Id.* at § 8131.

134. The HAC identified several programs, to include the F-22 program and various missile programs. H.R. REP. NO. 105-206, at 15 (1997).

Additional Restrictions Placed on Multiyear Contracting Authority

The HAC specifically criticized the DOD for its application of multiyear contracting in budget requests. When used appropriately, multiyear contracts offer substantial benefits in terms of both cost savings and program stability. Once started, a particular program's funding is committed for several years and is unlikely to be reduced because of the termination liability costs associated with failure to adequately fund the program. According to the HAC, however, the military services have sought multiyear contracting authority from Congress even though the particular program otherwise lacked sufficient funding to actually execute the contract. The HAC viewed this tactic as a clear effort on the part of the military services to secure increased budget allocations from the Office of the Secretary of Defense. Hence, the 1998 DOD Appropriations Act now provides that Congress will consider no request for multiyear contracting unless it has been formally submitted as part of the President's budget or requested for in writing by the Secretary of Defense.¹³⁵

DOD Taken to Task for Mixing and Matching Funds

The HAC also criticized the DOD for what it perceived to be the growing abuse of RDT&E appropriations. The committee acknowledged the desire of many within the DOD's acquisition community (particularly program managers) to merge development and procurement funding into a single appropriation. According to the HAC, however, such a practice would severely impede oversight by both senior DOD managers and Congress. The committee further noted that the DOD has allowed its program managers to blur distinctions between these appropriations. According to the HNSC, the DOD has repeatedly used RDT&E funding to initiate production and production funding to initiate development.¹³⁶ Against this backdrop, the HAC served notice that "it takes its oversight responsibilities seriously and will not tolerate lax observance of the long-standing policies on the proper use of appropriations."¹³⁷ Consequently, the 1998 DOD Appropriations Act prohibits the DOD from using RDT&E funds to procure end-items for any DOD system unless the items will be used as part of the test and evaluation process leading up to a final production determination.¹³⁸

Purchases of Foreign-Made Goods

The HAC has identified an apparent increase in the procurement of foreign-made goods by the DOD when simplified acquisition procedures are used. Since the DOD does not have a system for tracking such information, the HAC directed the DOD Inspector General (DODIG) to randomly audit simplified acquisitions at various CONUS-based military installations to determine the extent of this phenomenon. The DODIG must report its findings to the Committees on Appropriations no later than 30 April 1998.¹³⁹

Air Force Institute of Technology (AFIT)

In an effort to cut costs, the Air Force plans to eliminate its in-residence programs at the Air Force Institute of Technology (AFIT) in FY 1998. Although acknowledging the budgetary reasons for such action, the HAC questioned the absence of a recent "comprehensive" cost-benefit study to support this change in policy. Consequently, the committee directed the National Academy of Sciences to complete a cost-benefit analysis on this matter and report back by April 1998.¹⁴⁰ Additionally, commencing with academic year

135. Pub. L. No. 105-56, § 8008, 111 Stat. 1203, 1221.

136. The HAC is particularly disturbed over a trend in missile programs to initiate production to provide an interim warfighting capability using research and development funding, contrary to committee direction and DOD policy on the use of such funding. H.R. REP. NO. 105-206, at 15 (1997).

137. *Id.*

138. The 1998 DOD Appropriations Act exempts programs funded within the National Foreign Intelligence Program, or in those cases where the Secretary of Defense has waived this restriction in the interests of national security and has informed Congress of this determination. Pub. L. No. 105-56, § 8114, 111 Stat. 1203, 1245 (1997).

139. H.R. REP. NO. 105-206, at 41 (1997).

140. *Id.* at 53.

1998-1999, the 1998 DOD Appropriations Act prohibits the Air Force from sending graduate students who would otherwise have attended AFIT to civilian institutions.¹⁴¹

Military Construction Authorization Act for Fiscal Year 1998

Introduction

On 18 November 1998, President Clinton signed the Military Construction Authorization Act for Fiscal Year 1998 (1998 Construction Act).¹⁴² The 1998 Construction Act authorizes \$9.124 billion in budgetary authority for specified military construction projects, unspecified minor military construction projects, the military family housing program, and for activities associated with base realignment and closure.¹⁴³

Congress Provides DOD Greater Authority to Use O&M Funds for Unspecified Minor Military Construction

Congress has expanded on the authority of deploying commands to use O&M funds for minor military construction projects. Specifically, the Secretary of Defense can use “mobility enhancement funds” for minor construction work (i.e., construction projects that do not exceed \$1.5 million) that “enhance[s] the deployment and mobility of military forces and supplies.”¹⁴⁴ Keep in mind, however, that any construction work costing over \$500,000 must be still approved in advance by the appropriate agency Secretary.¹⁴⁵

Additional Reporting Requirement for Big Dollar Repair Projects

For facility repair projects with an estimated cost that exceeds \$10 million, the relevant agency Secretary is now required to first submit to Congress a report justifying the use of O&M funds for such work.¹⁴⁶ Additionally, the 1998 Construction Act defines a “repair project” as “a project to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose.”¹⁴⁷

Threshold for Minor Land Acquisitions Increased

The 1998 Construction Act now allows the Secretary of a military department, in the interest of national defense, to acquire any interest in land that does not exceed \$500,000. This represents an increase from the previous cap of \$200,000.¹⁴⁸

141. This provision applies: (1) if the civilian degree program is otherwise offered by the AFIT (or was offered by the AFIT during the 1996-1997 academic year); (2) the officer is qualified for enrollment at AFIT in that degree program; and, (3) the number of students commencing the AFIT program during the first semester of the 1998-1999 academic year is less than the number of students commencing that degree program for the first semester of the 1996-1997 academic year. Pub. L. No. 105-56, § 8099, 111 Stat. 1203, 1242 (1997).

142. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629 (1997).

143. The administration’s construction budget request was \$8.374 billion. The House report on military construction asserts that the budget request, in constant dollars, is 25 percent less than that sought in FY 1996 and 28 percent less than what Congress authorized for the same year. The report also points to a study by the Defense Science Board Task Force on Quality of Life that found 62 percent of barracks and dormitories and 64 percent of military family housing to be unsuitable. H.R. REP. NO. 105-132, at 431 (1997). Among the problems common in these substandard housing units are asbestos, corroded pipes, inadequate ventilation, faulty heating and cooling systems, and peeling lead-based paint. H.R. REP. NO. 105-150, at 3 (1997).

144. Pub. L. No. 105-56, § 2801, 111 Stat. 1203 (amending 10 U.S.C. § 2805).

145. *Id.*

146. *Id.* § 2802 (amending 10 U.S.C. § 2811).

147. *Id.* In its report, the HAC set forth the following guidelines for funding repair work from the O&M account:

Components of the facility may be repaired by replacement, and such replacement can be up to current standards or codes. Interior rearrangements and restorations may be included as repair, but additions, new facilities, and functional conversions must be performed as military construction projects . . . Such projects may be done concurrent with repair projects, as long as the final conjunctively funded project is a complete and usable facility.

H.R. REP. NO. 105-150, at 9 (1997).

The Military Construction Appropriations Act, 1998

Introduction

The Military Construction Appropriations Act, 1998¹⁴⁹ (1998 MCA Act) provides \$9.183 billion in funding for the planning, design, construction, alteration, and improvement of active and reserve military facilities worldwide. It finances the construction, alteration, improvement, operation, and maintenance of military family housing. This includes payments against past housing mortgage indebtedness. Community impact assistance may also be provided, in addition to assistance to members of the military who face loss on the sale of private residences due to installation realignments and closures. It is also the source for the United States share of the NATO Security Investment Program and the funding to implement base realignments and closures authorized by law.¹⁵⁰

Cost-Plus-Fixed-Fee Contracting

As in past years, the 1998 MCA Act prohibits the use of “cost-plus” contracting procedures for construction contracts exceeding \$25,000. To take into account the uncertainty associated with environmental remediation efforts, however, this prohibition does not apply to contracts for environmental restoration at closing bases.¹⁵¹ This year, the HAC specifically denied a DOD request to extend the use of “cost-plus” contracting authority to “all contracts . . . which are funded from the Base Realignment and Closure accounts.” The HAC, though, invited the DOD to submit a “detailed justification citing instances in which base closure and realignments have been impeded” by this restriction.¹⁵²

Contingency Construction Contracting

The 1998 MCA Act appropriates \$4 million to the DOD for its “Contingency Construction Account,” less than half the amount sought in the DOD’s budget request.¹⁵³ The Secretary of Defense may use these funds for unforeseen facility requirements.

Notice Requirement Associated with Housing Contracts

It seems that everyone within the DOD is actively studying the viability of outsourcing installation housing responsibilities.¹⁵⁴ With this in mind, the 1998 MCA Act requires the service secretaries to notify Congress of payment guarantees placed in any solicitation for housing contracts.¹⁵⁵ The notice must state whether any guarantee, including the making of mortgage or rental payments, has been made to a private contractor. Additionally, the notice must include whether these guarantees take effect upon the closure or realignment of the installation, the reduction in force of units stationed at the installation, or the extended deployment overseas of units stationed at the installation. The nature of the guarantee and the extent and likelihood of government liability must also be addressed by the notice.¹⁵⁶

148. Pub. L. No. 105-56, § 2811 (amending 10 U.S.C. § 2672).

149. Pub. L. No. 105-45, 111 Stat. 1142 (1997). This represents \$800 million over the administration’s budget request and \$610 million under FY 1997 appropriations. The Senate Appropriations Committee (SAC) feels that the DOD’s budget request does not provide sufficient resources to continue the DOD’s efforts to modernize, to renovate, and to improve its existing facilities. S. REP. NO. 105-52, at 8 (1997).

150. S. REP. NO. 105-52, at 3 (1997).

151. Pub. L. No. 105-45, § 101, 111 Stat. 1142, 1146 (1997).

152. H.R. REP. NO. 105-150, at 44-45 (1997).

153. The budget request sought \$9.8 million for Defense-wide contingency construction. H.R. CONF. REP. NO. 105-247, at 30 (1997). As justification for the cut, the HAC merely stated that the funding provided was “adequate to meet the needs of the Department.” H.R. REP. NO. 105-52, at 21 (1997).

154. The SAC took notice of the DOD’s efforts to develop new privatization initiatives to meet the shortfall in adequate family housing. The committee, however, wondered about the DOD’s attempt to accelerate this program without allowing the time necessary to assimilate lessons learned from earlier projects. S. REP. NO. 105-52, at 27 (1997).

155. Pub. L. No. 105-45, § 128, 111 Stat. 1142, 1151.

Congress Rejects Request to Fund Current Year Programs with Prior Year Savings

The DOD budget request sought specific authority to use more than \$40 million in “prior year savings” to fund FY 1998 construction projects.¹⁵⁷ The conferees objected “strongly to this method of financing,” stating that proper budget procedures require the DOD to request rescission of the funds by account and by fiscal year.¹⁵⁸ Additionally, Congress noted that the proposed use of prior year funds “could jeopardize the successful completion of projects appropriated in prior years.”¹⁵⁹

Turmoil Over Funding of Army National Guard Construction Work Limits Funding for Overseas Classified Locations

In FY 1997, the SAC directed the Army to program at least \$75 million into its FY 1998 budget request for Army National Guard construction work. The Army failed to do so, requesting only \$45 million. Against this backdrop, the Army and the Army National Guard subsequently agreed to an annual budget request level of \$50 million for the Guard. In light of this, the SAC directed that no Army funding for overseas classified locations could be expended until at least \$50 million is requested for the construction of Army National Guard projects in both the FY 1999 budget request and future year defense plans.¹⁶⁰

No Relief in Sight from Historic Preservation Requirements

Congress is concerned that the costs of maintaining historic quarters are overburdening military housing accounts. Last year, Congress directed each military service to report on plans to remove all but the most significant historic homes. The services subsequently determined that they were unable to remove facilities from the National Register.¹⁶¹ Apparently, however, Congressional concern goes only so far, because Congress now directs the DOD to consult with the appropriate federal agencies “to identify and [to] pursue strategies for the services to maintain and use historic housing consistent with their mission and budgetary resources.”¹⁶²

The Line Item Veto—“It Ain’t Over ‘til It’s Over”¹⁶³

On 30 September 1997, President Clinton signed the 1998 Military Construction Appropriation Act.¹⁶⁴ On 6 October 1997, however, the President exercised his line item veto authority, striking \$287 million worth of work from the 1998 MCA Act.¹⁶⁵

156. *Id.* Congress is apparently concerned about proposed privatization initiatives, which contain provisions that shift financial risk and liability from the private sector to the government. Specifically, the SAC is studying guarantee provisions that cover mortgage payments or otherwise insulate private interests against future BRAC actions, force reductions, or extended deployments (e.g., rent and occupancy level guarantees). S. REP. NO. 105-52, at 27-28 (1997).

157. H.R. CONF. REP. NO. 105-247, at 8 (1997).

158. *See* H.R. REP. NO. 105-150, at 9 (1997).

159. H.R. CONF. REP. NO. 105-247, at 8 (1997).

160. S. REP. NO. 105-52, at 22 (1997). In the conference report accompanying the 1998 MCA Act, the conferees stated that the “language and allocations set forth in House Report 105-150 and Senate Report 105-52 should be complied with unless specifically addressed to the contrary in the conference report and statement of the managers.” H.R. CONF. REP. NO. 105-247, at 7 (1997).

161. S. REP. NO. 105-52, at 10-11 (1997).

162. H.R. CONF. REP. NO. 105-247, at 7 (1997).

163. Yogi Berra, commenting on the tight 1973 National League pennant race. *Pearls of Wisdom*, U.S. NEWS & WORLD REP., Aug. 29/Sept. 5, 1994.

164. Military Construction Appropriation Act, 1998, Pub. L. No. 105-45, 111 Stat. 1142 (1997).

165. President Clinton prefaced his line item veto message with the following: “In accordance with the Line Item Veto Act, I hereby cancel the dollar amounts of discretionary budget authority . . . I have determined that the cancellation of these amounts will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest.” Cancellation Pursuant to Line Item Veto Act; Military Construction Appropriations Act, 1998, 62 Fed. Reg. 52,452, Oct. 7, 1997.

President Clinton is the first President to have the power to veto certain items from the Appropriation or Authorization Acts without vetoing the entire act.¹⁶⁶ Since the veto, however, White House officials have conceded that some of the projects were mistakenly eliminated. As a result, the White House has pledged to work with Congress to restore funding for those vetoed projects.¹⁶⁷ Additionally, Congress may pass a bill to restore funding for the vetoed projects, but that bill is subject to Presidential veto as well. Congress then has thirty days to override the vetoes by a two-thirds vote in each chamber.¹⁶⁸

Bob Hope – A Great American

For the first time ever, Congress conferred the status of honorary veteran of the Armed Forces of the United States on one of this nation's citizens, Bob Hope.¹⁶⁹ Congress formally recognized the "lifetime of accomplishments and service of Leslie Townes (Bob) Hope on behalf of members of the Armed Forces of the United States."¹⁷⁰ Citing his more than fifty years of support to American service members, Congress noted that "[d]uring World War II, the Korean conflict, the Vietnam War, the Persian Gulf War, and the Cold War, Bob Hope traveled to visit and entertain millions of members of the Armed forces in numerous countries, on ships at sea, and in combat zones ashore."¹⁷¹ Perhaps the conferees said it best by closing its commentary on this provision with: "Thanks for the memories, Bob."¹⁷²

166. See Gerald Solomon and Porter Goss, *This Veto Is Working*, WASH. TIMES, Nov. 19, 1997, at A19 (authors, who are Republican congressmen, caution against any "rush to judgment" regarding criticism of the President's line item veto authority).

167. Rick Maze, *Some Vetoed Projects May Get Funding*, AIR FORCE TIMES, Oct. 20, 1997, at 6.

168. *Id.* See *Votes In Congress*, DAILY PROGRESS, Nov. 16, 1997, at A11 (voting 352 to 57, the House joins the Senate in passing legislation disapproving the President's use of the line item veto of certain military construction projects).

169. Pub. L. No. 105-85, § 1087, 111 Stat. 1629 (1997); Pub. L. No. 105-67, 111 Stat. 1452 (1997).

170. Pub. L. No. 105-85, § 1087, 111 Stat. 1629 (1997); Pub. L. No. 105-67, 111 Stat. 1452 (1997).

171. Pub. L. No. 105-85, § 1087, 111 Stat. 1629 (1997); Pub. L. No. 105-67, 111 Stat. 1452 (1997).

172. H.R. CONF. REP. NO. 105-340, at 810 (1997).